

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

Freightcar America, Inc., a Delaware Corporation,

Plaintiff,

vs.

Case No. 6:21-cv-00027-NKM

Davis-Frost, Inc., a Minnesota Corporation,

Defendant.

REMOTE DEPOSITION OF DARREN LOWE

DATE: March 23, 2022

TIME: 9:30 a.m.

PLACE: Veritext Virtual Videoconference

REPORTED BY: KELLEY E. ZILLES, RPR (Via Videoconference)

JOB NUMBER: 5148290

APPEARANCES

On Behalf of the Plaintiff (Via Videoconference):

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NOTE: Original transcript will be delivered to
Nancy A. Temple, Esq., as taking party of the
deposition.

1 what do you mean?

2 A. The next generation Water-Tuff.

3 Q. All right. And so you kept in a folder notes
4 and other documents relating to the formulation of the
5 next gen of Water-Tuff, is that correct?

6 A. Yes, the work we did with it.

7 Q. And it says November 2019 with an arrow, what
8 does that mean on the cover?

9 A. That's like November 2019 to December 2019
10 additive study.

11 Q. What does that mean?

12 A. So from the time frame of November 2019 to
13 December 2019 we did an additive study.

14 Q. When you say additive study, what do you mean?

15 A. We tested additives into the paint.

16 Q. What types of additives?

17 A. I don't recall off the top of my head.

18 Q. And that was over a one-year period, is that
19 right?

20 A. One-year period for what?

21 Q. November 2019 to December 2019 testing for
22 additives?

23 A. That's one month.

24 Q. Oh, I'm sorry, one month.

25 A. Two months, two months, November and December,

1 high film builds. And then we weren't able to, at the
2 end of December we presented our results to Freightcar
3 and we were not able to put additives in there to
4 eliminate the blistering completely. So in January we
5 started, I guess we called it the next gen development,
6 next gen generation formula to where we were going to
7 have to look at resins, the additives, the whole thing.
8 And that's what we did from January 2020 to
9 February 2021.

10 Q. Okay. And is that work complete?

11 A. Yes.

12 Q. So you said that the testing that you did of
13 additives in November and December of 2019, Davis-Frost
14 was not able to eliminate the blistering, correct?

15 A. That's correct.

16 Q. Did Davis-Frost notify Freightcar that
17 Davis-Frost had been working with Dow Chemical on a
18 blister study?

19 A. That I don't recall.

20 Q. You never notified anybody in your dealings with
21 Freightcar, you never notified anyone at Freightcar that
22 you were working with Dow Chemical on a blister study,
23 correct?

24 A. I don't believe I did.

25 Q. Now on the first page of Exhibit 224 there is

1 some handwriting in the lower right-hand side that says,
2 "Blister study, Water-Tuff." What did you mean when you
3 wrote, "Blister study, Water-Tuff"?

4 A. Blister study, Water-Tuff, it's a tab on a
5 folder.

6 Q. All right. And this was a project that
7 Davis-Frost had undertaken to study why blisters were
8 occurring with its Water-Tuff paint, correct?

9 A. Yes.

10 Q. Did Davis-Frost ever notify Freightcar that
11 Davis-Frost was conducting a "blister study"?

12 A. I don't think we called it a blister study.

13 Q. So you never told Freightcar --

14 A. I don't recall we used the word blister study to
15 Freightcar, I don't recall.

16 Q. And just to be clear, you never told Freightcar
17 that Davis-Frost was conducting a blister study?

18 A. I don't recall labeling it as a blister study.
19 They knew we were working on additive packages to
20 eliminate the blistering.

21 Q. Did you identify any of the additives to
22 Freightcar that you were trying to use in experimenting
23 to eliminate the blistering?

24 A. I don't think I did.

25 Q. On the second page of Exhibit 224, the first

1 Q. Okay. And the dibutyl phthalate, that is the
2 DBP that we were referring to, correct?

3 A. Yes, that's correct.

4 Q. And in fact, in Exhibit 224 on that same page
5 right below the Texanol alcohol that you crossed out and
6 wrote hold next to, you also crossed out and wrote hold
7 next to the DBP in that formula, correct?

8 A. Yes, that's correct.

9 Q. And that's because at that point in time you
10 suspected that the Texanol and DBP might be creating a
11 film on the outside of the paint and not allowing it to,
12 the solvents to evaporate sufficiently, correct?

13 MR. MAIER: Object to the form. Go ahead.

14 A. I think at that time I didn't, I was trying to
15 figure out what parameters in the formula were causing
16 the blistering.

17 Q. And you understood that the paint was curing too
18 fast from the outside in at that point, correct?

19 A. Yes.

20 Q. And based on your knowledge and chemistry
21 background, you started with looking at the effect of
22 these plasticizers and solvents on the curing process,
23 correct?

24 A. Yes.

25 Q. Were you aware that Davis-Frost had previously

1 was thinking. But looking at it now, yes, ma'am.

2 Q. And you didn't tell Freightcar that applying
3 heat in the drying process might increase blistering in
4 this December 2nd, 2019 letter, did you?

5 A. Did I what?

6 Q. You didn't tell Freightcar in December 2019 that
7 applying heat in the drying process would increase
8 blistering?

9 A. I think we had that discussion.

10 Q. And it's not referenced in your written letter
11 on December 2nd, 2019 to Freightcar, is it?

12 A. No.

13 Q. In fact, you told Freightcar in this letter
14 that, "Davis-Frost believed that using no heat during
15 any of the drying process created the worst case
16 scenario for drying of the paint and produces the
17 greatest potential for blistering to the coating,"
18 correct?

19 A. That's what it says. And looking at it now, I
20 think I was trying to say there is if you paint
21 something and it never sees heat, it stays at ambient
22 temperatures, and then the coating sometime after, it's
23 exposed to high temperature, whether it's ambient heat
24 outside or direct sunlight, that could cause blistering.

25 Q. But you didn't write to Freightcar that

1 exposing, after ambient temperature drying of the paint,
2 exposing the rail car to sunshine or heat would cause
3 blistering, did you?

4 A. I don't recall.

5 Q. Well, do you see it in your letter in
6 Exhibit 225?

7 A. I don't see it.

8 Q. And you understood that Freightcar was relying
9 on Davis-Frost's chemical expertise in the information
10 it received from Davis-Frost about Davis-Frost paint?

11 MR. MAIER: Object to the form. Go ahead
12 and answer.

13 A. I assume so.

14 Q. And you knew that Freightcar didn't have a
15 chemical lab like Davis-Frost did, correct?

16 A. I'm not sure what Freightcar has or doesn't
17 have.

18 Q. Were you aware, sir, in December 2019 of any
19 chemist working at Freightcar America who was working in
20 a chemical lab at Freightcar America?

21 A. Not to my knowledge.

22 Q. In that same paragraph at the beginning you
23 wrote to Freightcar, "In addition to the work above, we
24 are working on a reduced solvent version of the current
25 TTX yellow (DIW265) that has shown favorable results for

1 A. Yes.

2 Q. So you were as of December 4th going to send
3 panels to some third-party for testing and Greg
4 Carmichael was going to send a repair plan to
5 Freightcar?

6 A. That seems right.

7 Q. Did Mr. Carmichael ever send a repair plan to
8 Freightcar?

9 A. I think he did.

10 Q. Did you review the repair plan?

11 A. It's possible. I'm not recalling at the moment,
12 but it's possible that I did.

13 Q. Did you do any testing in November or December
14 of 2019 to support any repair plan recommended by
15 Davis-Frost?

16 A. Not to my knowledge.

17 Q. On December 7, 2019 you have some further notes,
18 what does that refer to?

19 A. I think that's a different project.

20 Q. And when you wrote on December 4th about sending
21 panels to a third-party, did you do that?

22 A. We prepared them and then Rudy was going to tell
23 us where to send them to and all that and they, they, I
24 believe they cancelled the request to do that.

25 Q. At the bottom third of this page it says, "Test

1 results, all pass AD," that refers to what, an adhesion
2 test?

3 A. Air dry.

4 Q. Air dry?

5 A. Yes.

6 Q. Okay. And then you wrote, "Mineral brown and 60
7 gloss black are nonsensitive," and then you crossed that
8 out, or I'm sorry, "more sensitive," and then you
9 crossed that out, is that right?

10 A. Yeah, it looks like that, more sensitive, yep.

11 Q. So you originally wrote, "Mineral brown and 60
12 gloss black are more sensitive to blistering at no flash
13 and higher temps than TTX yellow," correct?

14 A. Originally I wrote it seems more sensitive,
15 yeah, to blistering at no flash, yes, mm-hmm.

16 Q. Why did you cross out more sensitive?

17 A. I don't know what the second word is, but it
18 looks like it's are affected, maybe that's what it is,
19 but I don't know.

20 Q. As of December 2019 were the mineral brown and
21 gloss black performing differently from the TTX yellow
22 Water-Tuff?

23 A. I don't recall, but the next line says they all
24 blistered at 7 plus mils.

25 Q. Okay.

1 A. But I can't remember exactly why, I'm drawing a
2 blank, I'm sorry, I just don't.

3 Q. In any event --

4 A. I think, yeah, I just don't recall. I don't
5 recall what I was saying with that or why I changed it.

6 Q. The next line as you referenced, you wrote, "All
7 three blister at 7 plus," you're referring to 7 plus
8 DFT?

9 A. Dry film thickness, yeah.

10 Q. All right. And by all three you're referring to
11 the three Water-Tuff paints, mineral brown, black and
12 TTX yellow?

13 A. Yes, I'm assuming, yes.

14 Q. And that was based on test results as of around
15 December 7, 2019?

16 A. I don't remember the date, but it's part of that
17 spreadsheet that has all three of them on there, the
18 various scenarios we went over in my deposition.

19 Q. On the next page of your notes, which is Bates
20 stamped DF2518, you wrote, "Increase flash time, reduces
21 blisters, all blistered 4 mils or higher with no flash
22 at 140 degrees Fahrenheit on heat lamp test." Was that
23 a true statement as of that point?

24 A. I believe so.

25 Q. Okay. And this was sometime in December of

1 2019, correct?

2 A. Yes.

3 Q. And you understood that Davis-Frost had
4 recommended 20 minutes flash time in its product data
5 sheet that it published for its Water-Tuff formula,
6 correct?

7 A. That's correct.

8 Q. And you also wrote in December 2019 in your
9 notebook, "The warmer the air, the greater the
10 blistering." What did you mean by, "The warmer the
11 air"?

12 A. In the oven, the higher the oven temperature,
13 the blistering potential went up at the same film build.

14 Q. And then you also wrote, "Our coatings will
15 blister, dry film build greater than 5 mils DFT per
16 single coat." Was that a true statement then as of
17 December 2019 when you wrote that?

18 A. Yes.

19 Q. And that was --

20 A. I'm assuming so.

21 Q. Okay. I'm sorry, I didn't mean to interrupt
22 you. You're assuming that that note that you wrote in
23 December 2019 that Davis-Frost coatings will blister
24 when the dry film build was greater than 5 mils DFT per
25 single coat, that that was based on your testing as of

1 that point in time?

2 A. Yes.

3 Q. And you also wrote, "Our coatings will blister,
4 dry film build greater than 6 mils DFT total," correct?

5 A. Yes.

6 Q. And again, that was based on the testing that
7 you had done of the Water-Tuff paints as of
8 December 2019 when you made these notes?

9 A. Yes.

10 Q. Did you tell or communicate to anybody at
11 Freightcar at any time that Davis-Frost testing
12 indicated that the Davis-Frost waterborne paint would
13 blister if the dry film thickness was greater than 5
14 mils DFT per single coat?

15 A. I don't recall doing so.

16 Q. Did you tell anybody at Freightcar that in
17 December 2019 Davis-Frost testing indicated that the
18 Davis-Frost waterborne paints would blister with a dry
19 film build of greater than 6 mils DFT total?

20 A. I don't recall.

21 Q. Were you instructed not to share that
22 information with anyone at Freightcar at that time?

23 A. No, I think we shared that in the conference
24 call when we reviewed the spreadsheet in December.

25 Q. I thought you just testified that you did not

1 A. Okay.

2 Q. And for the record, this is Bates stamped
3 FCA1234 and it's an Excel spreadsheet that was marked at
4 Dr. Charlie Hegedus' deposition, it was marked as
5 Exhibit 219 at that deposition. Do you recognize this
6 spreadsheet?

7 A. Yes.

8 Q. And this is a spreadsheet of test results that
9 you were talking about that were provided to Freightcar
10 in December 2019?

11 A. I think so, yes.

12 Q. Okay. If you could look at the first set of
13 panels where the panel description is air dry only.

14 A. Okay.

15 Q. And do you see where it says DFT 6.1 in the row?

16 A. Yes.

17 Q. Did Davis-Frost report to Freightcar any
18 blistering with 6.1 DFT?

19 A. Here it said pass.

20 Q. Okay. And the next row below that where it says
21 7.5 DFT, did Davis-Frost report to Freightcar any
22 blistering at 7.5 DFT with the air dry only panel
23 description?

24 A. We presented this data to them.

25 Q. Does it say blistering at 7.5 DFT?

1 A. No, it doesn't.

2 Q. And then in the next panel descriptions where it
3 says, "One and a half hour flash, three hours at
4 100 degrees Fahrenheit," did Davis-Frost report any
5 blistering at 5.8 DFT?

6 A. No, it doesn't look like it.

7 Q. Did Davis-Frost report any blistering under that
8 flashing and drying condition at 7.5 DFT?

9 A. It looks like they passed.

10 Q. Okay. So Davis-Frost is representing to
11 Freightcar in these test results that at air dry only or
12 one and a half hour flash, three hours at 100 degrees
13 Fahrenheit at 7 and a half DFT and below, their paint
14 will not blister, is that fair?

15 A. From this testing, that's what it shows.

16 Q. All right. And then the third set of panel
17 condition description is, "No flash one and a half hours
18 at 140 degrees Fahrenheit." And that 140 degrees
19 Fahrenheit, that's what you were using as your heat lamp
20 test, correct?

21 A. No, that's the oven temperature.

22 Q. Okay. And what temperature was used in the
23 column for heat lamp test for each of these three
24 waterborne paints?

25 A. I want to say 160 Fahrenheit.

1 Q. And Davis-Frost was presenting and representing
2 to Freightcar that for the mineral brown there was no
3 blistering at 5.2 DFT with those flashing and curing
4 conditions, correct?

5 A. That's correct.

6 Q. And Davis-Frost was also representing that at 6
7 DFT there was no blistering, correct?

8 A. That's correct.

9 Q. And I'm looking at the mineral brown again. Now
10 can you explain the discrepancy between the results in
11 this spreadsheet and your handwritten notes in your
12 notebook?

13 MR. MAIER: Object to the form. Go ahead
14 and answer.

15 A. I don't think I can. Yeah, I don't know, I
16 can't.

17 Q. I want to look back at your notes in
18 Exhibit 235. And we were just looking at the test
19 results in your notes on Page DF2517.

20 A. 2517.

21 Q. If you could go to the next page which is Bates
22 No. DF2518.

23 A. Yeah.

24 Q. And you wrote, "Increased flash time reduces
25 blisters," correct?

1 A. "Increased flash time reduces blisters."

2 Q. And that was based on your testing in

3 December 2019?

4 A. Yes.

5 Q. You also wrote, "All blistered 4 mils or higher

6 with no flash at 140 degrees Fahrenheit on heat lamp

7 test." Was that based on the test results at that time

8 in December 2019?

9 A. I'm assuming so.

10 Q. Can you explain why your spreadsheet in Hegedus

11 Exhibit 219 that was provided to Freightcar does not

12 show any blistering at 4 DFT or higher with no flash at

13 140 degrees Fahrenheit on the heat lamp test?

14 A. Let me go back. And this is the no flash?

15 Q. Right.

16 A. On the no flash, I don't know, we did 3.6, 4.1

17 it blistered and then 5.3 it did and 5.6. I don't have

18 a good answer.

19 Q. And then looking back at your notes again in

20 Exhibit 235, at the bottom of that page which is DF2518.

21 A. Hang on, hang on. 235, Page 18, yes.

22 Q. In your last note that you wrote on that page

23 you wrote, "DIW265 TTX yellow, mineral brown and black

24 60 gloss performed similarly, all blistered at the same

25 DFT, flash time and temperature." That's a note that

1 A. I guess it was that date.

2 Q. All right.

3 A. Yes, it seems like Friday, 22nd, mm-hmm.

4 Q. Did you do anything with this report from Dow
5 Chemical about the blister study when you got it?

6 A. I don't recall what I did.

7 Q. Why didn't you share a copy of this blister
8 study with anybody at Freightcar America?

9 A. I don't know.

10 Q. And the following Tuesday, November 26, 2019 you
11 traveled to Shoals, Alabama and met with Freightcar
12 about the reported blistering on the Mitsui well car
13 order. Why didn't you tell Freightcar that you were
14 working with Dow on a blister study to solve the problem
15 at that point in time?

16 A. I think that was proprietary information, we
17 hadn't disclosed who was our supplier and all of that,
18 that's not something we would share. I'm assuming
19 that's why we didn't.

20 Q. What's the big secret about Dow being a supplier
21 to Davis-Frost?

22 A. Well, it has our resin system in it.

23 Q. Well, it's a product that, one of many materials
24 that you purchase from third parties, correct?

25 A. Yep.

1 was blistering with the yellow waterborne paint, right?

2 A. Yes.

3 Q. And Cal Henning writes to TTX on November 5,
4 2019, "We had undertaken an aggressive development and
5 testing program in our lab to improve the tolerance of
6 our coatings using the BNSF testing specifications as a
7 guide which called for coatings to perform
8 satisfactorily at dry film thicknesses of up to 9 mils.
9 We have been successful in meeting that requirement."
10 What aggressive development and testing program in
11 Davis-Frost's lab had occurred as of November 5, 2019?

12 MR. MAIER: Object to the form, object as
13 beyond the scope, we produced a different witness for
14 this exhibit. Go ahead and answer.

15 A. It's not my email, so I can't answer.

16 Q. Aside from the email, as of November 5th, 2019
17 as the lead chemist at Davis-Frost, have you
18 participated in an aggressive development and testing
19 program using the BNSF testing specifications as a guide
20 with test results showing satisfactory dry film
21 thicknesses up to 9 mils?

22 MR. MAIER: Same objection. Go ahead.

23 A. I don't recall.

24 Q. Well, looking at the exhibits that you've looked
25 at and testified about today, it was after November 5th,

1 2019 that Davis-Frost began testing on the blister study
2 and all the test results showed that at 9 mils DFT there
3 was blistering, correct?

4 MR. MAIER: Object to the form. Go ahead.

5 A. In which report?

6 Q. All the November and December 2019 test results.

7 A. Yes, those were I think blistered at 9.

8 Q. Had you ever seen any test results that
9 supported Mr. Henning's statement to TTX and Freightcar
10 in Exhibit 125 that existed prior to November 5th, 2019?

11 MR. MAIER: Object to the form, beyond the
12 scope. Go ahead.

13 A. I don't recall.

14 MS. TEMPLE: All right. Why don't we take
15 a ten-minute break and I'll just check my notes and see
16 how much more I have, and if I do, it's not much.

17 MR. MAIER: Okay. Let's come back in ten
18 minutes.

19 (A break was taken at 1:44 p.m.)

20 BY MS. TEMPLE:

21 Q. I just have a few questions. First, Mr. Lowe,
22 can you refresh your exhibit folder and open up what's
23 been marked Exhibit 244.

24 A. Okay.

25 Q. All right. And this is an email that you

1 A. I don't recall.

2 Q. On the second page of this document under
3 application, 5A refers to 4 to 8 mils dry film
4 thickness?

5 A. Yes, ma'am.

6 Q. We saw from your notes that the testing in
7 November 2019, December 2019 indicated that there was
8 blistering at more than 5 mils DFT per single coat
9 application and more than 6 mils DFT total. Are you
10 aware of any other testing that relates to that
11 statement in 5A?

12 MR. MAIER: Object to the form, assumes
13 facts not in evidence. Go ahead and answer if you are
14 able.

15 A. I think that statement was, I, I don't have any
16 data that made that statement, that was something I
17 think Cal put in there.

18 Q. Okay. And what basis did Cal Henning have to
19 put that statement in there?

20 A. I guess experience with the product.

21 Q. And your tests showed in November and
22 December 2019 that we've gone over before showed
23 blistering at less than 8 mils DFT, correct?

24 A. Yes.

25 Q. Under Section 8, the touch-up procedure, is this

1 what Davis-Frost was recommending if after the paint is
2 applied and cured and inspected that there's an issue
3 that needs to be addressed before the final rail car is
4 actually sold?

5 A. Yes.

6 Q. So, for example, on the next page under 8E as in
7 Edward, if there's low film thickness, which I take
8 would be below 4 DFT, is that right?

9 A. I'm assuming that, yes.

10 Q. So low film thickness Davis-Frost is
11 recommending it to be corrected by respraying or
12 brushing the paint on, depending on the size of the area
13 and location, correct?

14 A. Correct.

15 Q. So that would involve applying a second coat of
16 Water-Tuff paint if the first coat ended up less than 4
17 DFT?

18 MR. MAIER: Object to the form. Go ahead
19 and answer.

20 A. That's what it says.

21 Q. But you're not aware of any testing by
22 Davis-Frost prior to the test results that we looked at
23 that began in November 2019 relating to any of the
24 recommendations in Exhibit 7?

25 A. Not to my knowledge.